

NGUYEN (Migration) [2021] AATA 2855 (3 August 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr HOANG GIANG NGUYEN

CASE NUMBER: 1808837

DIBP REFERENCE(S): CLF2013/255997 CLF2018/32617

MEMBER: Hugh Sanderson

DATE: 3 August 2021

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 03 August 2021 at 4:39pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing relationship – no substantive responses to tribunal’s invitations to comment and provide current information – validly married – applicant moved interstate – no indication of relationship on sponsor’s social media – separate bank accounts – limited evidence of household and social aspects of relationship and nature of commitment – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359(2), 359A
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cl 801.221(2)(c)

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 16 March 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 23 September 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Background

4. The applicant is a citizen of Vietnam and is currently 39 years old. His parents continue to live in Vietnam and he has a brother who lives in Germany. The sponsor of the applicant is Khanh Phuong Thi Pham. She was born in Vietnam and is currently 41 years old. She was granted a Subclass 100 Partner visa based on her relationship with her former husband in 2004. She divorced her husband in December 2011. There were no children of that relationship.
5. The parties claim they first met each other on 12 June 2011. A relationship developed and the applicant applied for a Prospective Marriage visa. This was granted to him on 20 May 2013 and he first entered Australia on 4 June 2013. The parties were married on 27 July 2013 with the applicant's mother travelling to Australia to attend the wedding. The applicant was granted a Subclass 820 Partner (Temporary) visa on 31 October 2013.
6. In support of the grant of the Subclass 801 Partner (Residence) visa the applicant provided various documents in support of the application including the following:
 - Joint bank account statement;
 - Telephone accounts;
 - Car insurance in their joint names;
 - Superannuation details for both parties;
 - Telephone and chat records;
 - Tax returns of the applicant and the sponsor showing they had nominated each other as their spouse;
 - Correspondence addressed to the parties at the home they claimed to share;
 - Medibank Private health insurance details;
 - Tax receipts for the parties;

- Photos of the parties together at various social events in Australia and in Vietnam;
 - Evidence of travel together in Australia and Vietnam;
 - Statements by friends claiming they believed the relationship was genuine; and
 - Statements by the parties.
7. The Department accessed the sponsor's Facebook page. The information on the page did not indicate the sponsor was in a relationship with the applicant. For her relationship status, the sponsor stated: "It's complicated".
8. The delegate who considered the application noted the following:
- The joint bank account statement showed income being deposited, but did not appear to be used for any day-to-day household expenses;
 - There was otherwise little information as to the financial aspects of the relationship;
 - Correspondence and other documents addressed to the parties at their shared residence could have been generated by the parties and not been a true reflection of their living together;
 - The photos of the parties together showed them on only limited occasions; and
 - There did not appear to have been any development of their relationship since the grant of the Subclass 820 Partner (Temporary) visa.
9. The delegate was not satisfied the parties were in a genuine and continuing relationship and accordingly found the applicant was not the spouse, as defined in s.5F of the Act, of the sponsoring partner. The delegate found the applicant did not meet the criteria in cl.801.221 and refused the application.

Information to the Tribunal

10. The Tribunal wrote to the applicant on 4 June 2021 inviting him to attend a hearing before the Tribunal on 28 June 2021. The Tribunal asked that the sponsor also be available to give evidence at the hearing. The Tribunal directed that any further information in support of the application be provided at least seven days prior to the hearing date.
11. At the time the initial hearing invitation was sent, the applicant was represented by Uyen Nguyen from UN Immigration Specialists Pty Ltd. The residential address provided by the applicant to the Tribunal was an address in Cabramatta West in Sydney.
12. On 16 June 2021 the Tribunal received from the applicant's agent a notice stating they were no longer acting for the applicant. They provided an authority signed by the applicant to release their file to the applicant's new representatives, Bui Lawyers.
13. On 23 June 2021 at 3:56pm, the Tribunal received an email from the applicant's representative, Thu Bui, requesting a two month adjournment of the hearing. It was stated that the applicant had relocated to live in Western Australia and as the borders had been closed due to the COVID-19 pandemic, it meant the applicant was not able to travel to Sydney to attend the hearing.

14. The Tribunal responded to the request for a postponement on 24 June 2021 at 9:43am. The Tribunal refused the request for postponement. It was noted that the applicant's current agent had been acting for the applicant since at least 16 June 2021. No information had been provided by the applicant as to his current situation or even if he was in a continuing relationship with the sponsor. It was noted that, based on the applicant's driver's licence provided by him, he had been living in Western Australia since, at the latest, November 2020 but had not provided any updated contact information to the Tribunal. It was noted that apart from the current travel restrictions, there appeared to be no reason why the applicant was seeking a postponement of the hearing. Accordingly, the Tribunal confirmed that the hearing would proceed by way of MS Teams video at the same time and date as previously advised.
15. The Tribunal sent a SMS hearing reminder to the applicant's mobile telephone number on 21 June 2021 and 25 June 2021. There is nothing to indicate the applicant did not receive those hearing reminders.
16. An officer from the Tribunal telephoned the applicant's agent on 25 June 2021 at 9:43am. The applicant's agent confirmed that he had received the hearing invitation sent on 24 June 2021 but that he was awaiting instructions from the applicant and advised the officer that they would be forwarding the hearing response information once he heard back.
17. No further request for postponement was received by the Tribunal prior to the hearing. No indication was given that the applicant would not be able to attend the hearing due to any technological issue or inability to attend the hearing by MS Teams. No further information was provided by the applicant in support of his application.
18. The applicant and the applicant's representative did not appear before the Tribunal on the day and at the scheduled time and place. An officer from the Tribunal contacted the applicant's representative when neither the applicant nor his representative attended for the MS Teams video hearing. The representative stated he did not have instructions to appear at the scheduled hearing. The representative was advised that as there was no appearance by the applicant or anyone on his behalf the matter would be noted as the applicant failing to attend the hearing. The applicant's representative was advised that as the applicant had failed to attend the hearing the matter may be dismissed.
19. The Tribunal issued an initial dismissal of the application. This decision was sent to the applicant's agent on 29 June 2021. The applicant applied for a reinstatement of the application on 13 July 2021.
20. The Tribunal reinstated the application on 16 July 2021. On 16 July 2021, the Tribunal sent to the applicant's agent a further hearing invitation, inviting the applicant to attend an MS Teams video hearing to be conducted on 5 August 2021. At the same time, the Tribunal sent to the applicant a letter pursuant to s.539A of the Act stating as follows:

Sponsor's Facebook page

- When assessing your application, the Department accessed the sponsor's Facebook page. The information posted by the sponsor on her Facebook page showed no indication that she was in any relationship with you and did not provide any photos or any information to indicate or show that she was in a continuing relationship with you. For her relationship status, the sponsor stated simply "it's complicated".

Subject to your comment on or response to this information, this would be the reason, or a part of the reason, for affirming the decision under review as it indicates the sponsor does not represent herself as being in a continuing relationship with you. It indicates that you and the sponsor do not represent yourselves as being in a genuine and continuing relationship or having a mutual commitment to a shared life as husband and wife to the exclusion of all others. It indicates that the sponsor does not consider herself to be in a long-term relationship with you or any relationship with you at all. The Tribunal may conclude that you are not the

spouse, as defined in s.5F of the Act, of the sponsoring partner and do not meet the criteria for the grant of the visa in cl.801.221.

21. In the same letter, the Tribunal requested pursuant to s.359(2) of the Act that the applicant provide any further information in support of the application.
22. The applicant was required to respond to the invitation to comment on or respond to the information, and provide information in support of the application not later than 30 June 2021. The applicant was advised that if he failed to respond by that date that he would lose this entitlement to a hearing and the hearing listed on 5 August 2021 would be vacated. As no response was received from the applicant by 2 August 2021, the Tribunal wrote to the applicant's agent on behalf the applicant, confirming that no response had been received by the Tribunal in respect of the s.359(2) and s.359A letter and, as such, the hearing that had been listed to be conducted on 5 August 2021 had been vacated. At the time of this decision, no further communication has been received from the applicant.
23. The applicant was represented in relation to the review by his registered migration agent.
24. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

25. The issue in the present case is whether the applicant is the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

26. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the "sponsoring partner", who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the sponsoring partner of the applicant.
27. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)–(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

28. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 27 July 2013. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

29. The applicant provided various documents to the Department as to the financial aspects of the relationship. This included a joint bank account statement for the period up to June 2016, receipts for the purchase of various items, insurance certificates and other financial documents in the joint names of the parties. The applicant has not provided any further documentation since 2017 to indicate that the parties are pooling their financial resources or they have any joint assets or liabilities or a sharing day-to-day household expenses.
30. The joint bank account shows deposits from the applicant's employer. It appears that the sponsor has a separate bank account into which her income is deposited. The withdrawals from both bank accounts primarily indicate withdrawals of cash and it is difficult to see from these withdrawals and the use of the account that the parties are pooling their financial resources or are sharing in day-to-day household expenses.
31. The parties executed wills in favour of each other in June 2017 at the time the applicant's agent was providing further documents to the Department in support of the application. It seems unusual that if the parties did genuinely wish to have wills prepared for the benefit of each other that they would have waited until sending documents in support of the application to have these documents prepared and executed. As the wills are non-binding and there is nothing to indicate that they have not been revoked since their execution, the Tribunal places no weight on these documents.
32. Similarly, the parties provided superannuation statements nominating each other as their death beneficiaries. These nominations are non-binding and there is nothing to indicate that since these nominations were made in 2017 that the parties have continued to nominate each other as their death beneficiaries and not changed the directions they have given to the superannuation fund trustees.
33. Evidence was provided of money being sent by the parties to the sponsor's family in Vietnam. Although it was claimed that this was done by the parties together or the applicant individually, there is nothing to support this claim. There is no evidence of money being withdrawn from the joint bank account specifically for the purpose of providing financial support to the sponsor's family. Again, nothing has been provided since 2017 to indicate any continuing financial support of the sponsor's family or indicating any shared financial commitment of the parties.
34. The applicant has provided no further information to the Department or to the Tribunal as to any financial aspects of the relationship since June 2017. The applicant has provided his driver's licence to show that he is residing in Merredin, Western Australia. As the licence has an expiry date of 11 November 2025, it would be expected that he has been residing there since not later than November 2020 when the licence would have been obtained. It is likely that he had been residing in Western Australia for some time before he decided to obtain a driver's licence in the state. No documentation has been provided which would indicate the parties continue to have any joint bank account or are pooling their financial resources or sharing any day-to-day household expenses in any way.
35. The material that has been previously provided by the applicant is now more than four years old. It does not indicate that at the time of this decision the financial aspects of the relationship support a finding that the parties are living in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Nature of the household

36. The applicant provided various documents to the Department in support of the claim that the parties were living together. This included documents addressed to the parties at the home they claimed to have been sharing in Cabramatta. Statements were provided by the applicant and the sponsor setting out details of their claimed life together. Statements from friends were also provided claiming that they were living together.
37. These documents and statements are now more than four years old. The evidence of the applicant is that he is currently living in Western Australia. Although he has not provided any details of the circumstances of his life in Western Australia, based on the fact that his driver's licence does not expire until November 2025, it appears that he has been living there since at least November 2020. There is no indication that the sponsor has been living with the applicant at any time while he has been living in Western Australia. No statement has been provided by the sponsor to indicate that she has been living with the applicant in Western Australia or that she has moved from Sydney. There is nothing to indicate that at the time of this decision the parties have any intention of living together in the future.
38. Although the applicant has provided documents to the Department to support the claim that the parties have established a household together, these documents and statements are now more than four years old. The Tribunal must consider whether at the time of this decision the parties remain in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others. Although the evidence of the parties' past relationship up to the time of this decision may give an indication of whether that relationship is ongoing, the applicant has provided no evidence to indicate that the current nature of the household of the applicant and the sponsor indicates that they are in any continuing relationship. On the evidence before the Tribunal, the Tribunal is not satisfied that at the time of this decision the parties are living together in a household indicative of their being in a genuine and continuing relationship or having a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Social aspects

39. The applicant provided to the Department various documents in support of the social aspects of the relationship. This included statements from friends claiming they believed the relationship was genuine, numerous photos of the parties at various social events, Marconi Club membership cards for the parties and evidence of travel together. These documents and statements are now over four years old. The applicant is now living in Western Australia and there is nothing to indicate that the sponsor is living in Western Australia with him or has any continuing contact with the applicant. There is nothing to indicate that the applicant currently represents himself as being married to the sponsor or that he is participating in any social activities with the sponsor.
40. Significantly, the sponsor in her Facebook pages does not indicate that she is in any continuing relationship with the applicant. In describing her relationship status, she simply states "it's complicated". On the Facebook page accessed by the Department the sponsor does not provide any photos of herself with the applicant or any indication that she is in any continuing relationship with him or that she participates in any social activities with him. She does not represent herself as being in any continuing relationship with the applicant.
41. When this information was put to the applicant, he failed to provide any statement from himself or any other information to indicate that the parties do continue to represent themselves being married to each other. No statement was provided by the sponsor to indicate she has any continuing relationship with the applicant and no statement was

provided by any other friend or relative of the parties to indicate that they believed the parties were in a continuing relationship.

42. The applicant has provided to the Department evidence that the parties participated in social activities. Most of these activities took place before June 2017. At that time, the sponsor was not indicating on her Facebook page that she was in any continuing relationship with the applicant or that they were participating in any social activities together. There is nothing to indicate that the parties have over the last four years participated in any social activities together or that they have any plans to undertake any joint social activities.
43. The Tribunal finds that the social aspects of the relationship do not support a finding that the parties are living together in a genuine and continuing relationship or that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Commitment to each other

44. The parties claim to have first met each other in June 2011. After being granted a Prospective Marriage visa, the parties were married in Australia on 27 July 2013. They have now been married for eight years.
45. The parties provided statements to the Department sworn prior to July 2017 claiming they were committed to each other. They stated that they plan to have children together, however, there is no indication that the parties have had any children together or that any failure to have children together is caused by any fertility issues they may suffer from. The statements provided by the applicant in support of the grant of the Subclass 801 visa show little or no development in the relationship since the initial application was made.
46. No further statement or documentation has been provided to the Tribunal to support the claim that the parties have any commitment to each other or to their claimed relationship. The applicant appears to be living in Western Australia. There is no information which would indicate the sponsor does not continue to live in Sydney. There is nothing to indicate that the parties are in any continuing communication with each other or that they provide any companionship and emotional support to each other. There is nothing to show that the parties consider their relationship as long term. This is particularly so when the sponsor states on her Facebook page that her relationship status is "complicated".
47. Overall, the Tribunal is not satisfied that the parties have the commitment to each other which would be expected of a couple who were living together in a genuine and continuing relationship with a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Overall assessment

48. The applicant is required to show that at the time of this decision he is the spouse of the sponsoring partner. The applicant has not provided any further information to the Department or to the Tribunal since the Department issued their decision in March 2018 refusing the grant of the visa on the basis that the delegate was not satisfied the parties were in a continuing relationship. The only information the applicant has provided to the Tribunal as to his current situation since then is that he is living in Merredin, Western Australia. He has provided no statements from either himself or the sponsor or any friends or relatives in support of the application. He has provided no documentation to show that the sponsor is living with him in Western Australia. He has provided no documentation to indicate the parties are pooling their financial resources or sharing day-to-day household expenses. There is nothing to indicate that the parties continue to represent themselves as being married to each other or that their relationship is at this time recognised by their

friends and family. There is nothing to indicate that the parties have any commitment to the relationship.

49. The Tribunal wrote to the applicant requesting further information in support of the application pursuant to s.359(2) of the Act. The Tribunal advised the applicant of information which would be the reason, or a part of the reason, for affirming the decision under review, being the Facebook posts of the sponsor which did not indicate she was in any continuing relationship with the applicant. The applicant did not respond to this information or requests for information or seek any extension of time to provide any information, response or comment.
50. The Tribunal has taken into account how the current COVID-19 pandemic would have affected the capacity of the applicant to provide this documentation. The applicant has had representation throughout the period during which his application has been before the Tribunal. There is nothing to indicate that the applicant has been unable to communicate with his representative or been unable to provide documentation which would be expected he would have access to if he were in any continuing relationship with the sponsor. Although a person in Western Australia is now not able to travel to New South Wales, there is nothing to indicate that the applicant would not be able to communicate with his agent through email or through ordinary mail to provide information or comments if he were in a continuing relationship with his sponsor. The applicant was able to have a signed statement requesting reinstatement of the application when it was initially dismissed by the Tribunal.
51. As indicated above, the applicant appears to have relocated to Western Australia not later than November 2020. The applicant failed to provide at that time any information which would indicate that he had relocated to Western Australia with the sponsor. The applicant has failed to provide any information as to his circumstances in Western Australia or anything to indicate any continuing relationship with the sponsor.
52. The Tribunal has considered all the circumstances of the applicant and the sponsor and all information provided by the applicant to the Department in support of the application both individually and cumulatively. Although the parties may have been living together previously, there is nothing to indicate that since 2017 the parties have been living together in a genuine and continuing relationship with a mutual commitment to a shared life as husband and wife to the exclusion of all others. The sponsor's Facebook page at that time indicates that the parties were not in a continuing relationship or, at the very least, the sponsor was questioning her continuing relationship with the applicant. The fact that no further documentation or information has been provided which would indicate that the parties are in any continuing relationship leads the Tribunal to conclude that any relationship the parties did have ceased not later than the end of 2017.
53. The Tribunal is satisfied that the applicant has had ample opportunity to provide information to the Tribunal to indicate any continuing relationship with the sponsor if he was in a continuing relationship with her. This is despite any inconvenience caused by the COVID-19 restrictions. The applicant has been able to communicate with his agent and the Tribunal at various times. He has not provided any response or comment to the adverse information provided to him by the Tribunal pursuant to s.359A of the Act, and has not provided any further information despite the request being made by the Tribunal pursuant to s.359(2) of the Act. No request for an extension of time was made by the applicant to make such comment or response or provide any further information.
54. In all the circumstances, the Tribunal finds that the parties are not in a genuine and continuing relationship and do not have a mutual commitment to a shared life as husband-and-wife to the exclusion of all others. The Tribunal finds that the parties do not live together and are instead living separately and apart on a permanent basis.

55. Given these findings, the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore, the applicant does not meet cl.801.221(2)(c).
56. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221(2A), (3), (4), (5) or (6).
57. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

58. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).